Multi-Party, Multi-Claim Litigation in the Federal Courts: The Unifying Influence of Judicial Economy

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MULTI-PARTY, MULTI-CLAIM LITIGATION IN THE FEDERAL COURTS: THE UNIFYING INFLUENCE OF "JUDICIAL ECONOMY"

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The phrase "judicial economy" is often used to describe the process of diminishing the total amount of litigation necessary to settle a dispute. If there is a dispute with a party asserting several related claims against another, or against several parties, it will often be desirable that all these claims are consolidated in a single action before a single judge. Getting all related claims and all interested parties before a federal court is often a problem because of the limited nature of federal jurisdiction.[1] However, some recent developments in multi-party, multi-claim litigation have made it easier to settle all relevant aspects of a case properly before a federal court. The recent cases do not yet form a completely consistent scheme for handling multi-party, multi-claim litigation. There remain anomolous rules which exclude additional parties or claims which could conveniently be included.[2] But there has been widespread recognition of the fact that a single rule, or a rule for each situation, which categorically forbids or requires the exercise of jurisdiction over an additional facet of a suit[3] cannot work as well as a discretionary framework which leaves the courts free to determine each case as a unique mixture of legal and equitable considerations. It has been said that this shift has caused an expansion of federal jurisdiction.[4] A careful examination of the cases reveals that the use of the word "expansion" is not accurate.

I. Recent Developments in Pendent Jurisdiction

A. *Pendent Jurisdiction Proper*

Since early in the nineteenth century, it has been settled that when a party invokes the jurisdiction of the federal court, asserting a right under a federal statute or under the Constitution, the federal court is not limited to a decision of that single federal question. In 1824, in *Osborn v. Bank of the United States*[5] the Supreme Court held that in deciding a federal

[1] "[A federal court] is a court of limited jurisdiction, it must, on its own motion, raise such jurisdictional questions as may be present even though they are not raised by the parties. This court is obliged to proceed on the assumption that it lacks jurisdiction until it is affirmatively demonstrated that jurisdiction exists." United States v. General Ins. Co. of America, 247 F. Supp. 543, 544 (N.D. Cal. 1965) (citations omitted). *See* Bowman v. White, 388 F.2d 756 (4th Cir. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968).

[2] *See* notes 3, 43, 101 *infra*, and accompanying text.

[3] For example, in a diversity action, the defendant may state a claim against a third-party defendant who is not diverse to the plaintiff, but the plaintiff may not state a claim against that same party. Schwab v. Erie L.R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Palumbo v. W. Md. Ry., 271 F. Supp. 361 (D. Md. 1967).

[4] 3A J. Moore, Federal Practice ¶ 18.07 (2d ed. 1969); Lowenfels, *Pendent Jurisdiction and the Federal Securities Acts*, 67 Colum. L. Rev. 474 (1967); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 Stan. L. Rev. 262 (1968); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968).

[5] 22 U.S. (9 Wheat.) 738 (1824).

question, the federal court had the power to decide any subsidiary point of law, federal or non-federal, necessary to dispose of the claim. Rejecting the argument that the power to decide cases arising under the Constitution or laws of the United States limited the federal judiciary to only those questions requiring construction of the Constitution or the federal law and no other, Chief Justice Marshall held:

> If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law.[6]

The *Osborn* decision was the beginning of the doctrine of "pendent jurisdiction," the concept that when a federal question is properly before the court, other questions which could not stand alone can be decided.

The theory of pendent jurisdiction, as the name implies, requires that the federal and the non-federal question be connected to each other by some relation other than that they just happen to be bones of contention between the same two parties. The case of *Hurn v. Oursler*[7] provided a clear statement of the type of non-federal claim which could be litigated as "pendent" to a federal claim. There, the plaintiff had a copyrighted and an uncopyrighted version of a play, both of which were shown to the defendant. The defendant incorporated ideas from the two manuscripts into a similar production already partially written. The plaintiff claimed a violation of the copyright laws with respect to the copyrighted manuscript, and unfair competition with respect to both manuscripts. In holding that the claim of unfair competition should not have been dismissed for want of jurisdiction, the Court described the limits of pendent jurisdiction in the following words:

> [T]he rule does not go so far to as permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground*; in the latter it may not do so upon the nonfederal *cause of action*.[8]

The Court, applying this rule to the facts of the *Hurn* case, held that as

[6] *Id.* at 822.
[7] 289 U.S. 238 (1933).
[8] *Id.* at 245-46.

to the copyrighted manuscript, there was jurisdiction in the federal court to hear the unfair competition claim, since it was pendent to the copyright claim, but that there was no jurisdiction to hear the unfair competition claim with respect to the uncopyrighted manuscript.

The *Hurn* case became the definitive statement of the limits of pendent jurisdiction and remained so for thirty-three years until *UMW v. Gibbs*.[9] In *Gibbs* the plaintiff had been hired as a mine superintendent during a time of inter-union rivalry. He had attempted to open a mine, using members of the Southern Labor Union, a rival of the United Mine Workers (UMW). Violence, allegedly caused by members of the UMW, erupted at the mine. In a suit against the UMW, the superintendent alleged a violation of section 303 of the Labor Management Relations Act of 1947[10] by reason of the pressure placed upon his employer to discharge him, and a violation of state tort law by reason of the violent methods used by the UMW. The facts necessary to establish the section 303 claim were not identical to those necessary to establish the state tort claim, for proof of violence was not a prerequisite to recovery under section 303. Reviewing the rule of *Hurn v. Oursler*, and noting that some lower court decisions had interpreted *Hurn* as requiring that the facts necessary to establish the federal and non-federal claims had to be identical for there to be an occasion for the exercise of pendent jurisdiction,[11] Mr. Justice Brennan described the scope of pendent jurisdiction in the following words:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[12]

This formulation of the rule enlarges the possible scope of pendent jurisdiction, and it is certainly true that this test will include non-federal claims that would not fit comfortably the language of *Hurn*. But the Court in *Gibbs* added another significant dimension to its decision, holding that this power did not have to be exercised by the federal court in each case, thus leaving a wide zone of discretion into which most subsequent cases have fallen.[13] If, in the opinion of the court, judicial economy and fair-

[9] 383 U.S. 715 (1966).

[10] 29 U.S.C. § 187(b) (1964).

[11] *See* Denys Fisher Ltd. v. Louis Marx & Co., 306 F. Supp. 956, 960 (N.D.W. Va. 1969), and cases cited therein; 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1901 n.19 (2d ed. 1969); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 660-62 (1968).

[12] 383 U.S. at 725 (footnotes omitted, emphasis in original).

[13] "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's

ness to the litigants, or considerations of comity, seem to militate against the exercise of pendent jurisdiction, there is no requirement that the federal court decide the non-federal claim. The Court also stated that the inquiry concerning whether pendent jurisdiction should be considered is never a closed question, but one which can be reconsidered as important facts emerge, such as the relative importance of the federal and non-federal claims or the amount of time already invested in the non-federal claim.[14]

Substantiality of the Federal Claim. For a federal court to hear a pendent non-federal claim, it is necessary only that the federal claim have "substance sufficient to confer subject matter jurisdiction on the court."[15] That requirement fulfilled, pendent jurisdiction is a discretionary question, not a jurisdictional one. The requirement of substantiality is an easy one to fill.[16] Some courts, both before and after *Gibbs*, have felt that the federal claim should be at least substantial enough to state a claim on which relief can be granted, so that if a federal claim were dismissed for failure to state a claim, a state law claim appended to it would also be dismissed.[17] Others require that the federal claim be viable until the time of trial,[18] though this view has been rejected by the Supreme Court.[19] Though the results of the cases are most reasonable, it would be better if it were made clear that the pendent claim's dismissal is not based on the inability of the federal claim to pass a certain fail-safe point, but rather is based on discretionary considerations, such as greater expertise on the point in the state courts,[20] a heavy additional burden of facts to be proved for the non-federal claim to be established,[21] or an insufficient commitment of

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right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . . ." *Id.* at 726 (footnote omitted). *See* Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir.), *cert. denied*, 397 U.S. 990 (1970); Shannon v. United States, 417 F.2d 256 (5th Cir. 1969); Hall v. E.I. DuPont DeNemours & Co., 312 F. Supp. 358 (E.D.N.Y. 1970); Rogers v. Valentine, 306 F. Supp. 34 (S.D.N.Y. 1969); Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); Litvak Meat Co. v. Denver Union Stock Yard Co., 303 F. Supp. 715 (D. Colo. 1969); Collidotronics, Inc. v. Stuyvesant Ins. Co., 290 F. Supp. 978 (E.D. Pa. 1968); Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968).

[14] 383 U.S. at 726-27; Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); *see* Shannon v. United States, 417 F.2d 256 (5th Cir. 1969); Hall v. E.I. DuPont DeNemours & Co., 312 F. Supp. 358 (E.D.N.Y. 1970); Iding v. Anaston, 266 F. Supp. 1015 (N.D. Ill. 1967); United States v. P.J. Carlin Constr. Co., 254 F. Supp. 637 (E.D.N.Y. 1966); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 664 (1968).

[15] 383 U.S. at 725; *see* Rogers v. Valentine, 306 F. Supp. 34 (S.D.N.Y. 1969).

[16] Bell v. Hood, 327 U.S. 678 (1946).

[17] Williams v. United States, 405 F.2d 951 (9th Cir. 1969); O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964); Dixon v. Martin, 260 F.2d 809 (5th Cir. 1958); Denys Fisher Ltd. v. Louis Marx & Co., 306 F. Supp. 956 (N.D.W. Va. 1969); Penn Mart Realty Co. v. Becker, 300 F. Supp. 731 (S.D.N.Y. 1969); Robbins v. Banner Indus., Inc., 285 F. Supp. 758 (S.D.N.Y. 1966); Fullerton v. Monongahala Connecting R.R., 242 F. Supp. 622 (W.D. Pa. 1965).

[18] Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967); United States v. General Ins. Co. of America, 247 F. Supp. 543 (N.D. Cal. 1965).

[19] *See* note 36 *infra*, and accompanying text.

[20] Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir.), *cert. denied*, 397 U.S. 990 (1970); Rogers v. Valentine, 306 F. Supp. 34 (S.D.N.Y. 1969); Catalano v. Department of Hosps., 299 F. Supp. 166 (S.D.N.Y. 1969); Chapiewsky v. G. Heileman Brewing Co., 297 F. Supp. 33 (W.D. Wis. 1968); Collidotronics, Inc. v. Stuyvesant Ins. Co., 290 F. Supp. 978 (E.D. Pa. 1968); Brody v. McCoy, 259 F. Supp. 940 (S.D.N.Y. 1966).

[21] *See* Robinson & Sons v. Mister Donut of America, Inc., 270 F. Supp. 99 (D. Mass. 1967); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966).

the resources of the litigants or the court to justify continuing with the case.[22] It is these and other equitable variables, and not a lack of jurisdiction over the pendent claim, which require dismissal.

Courts have been similarly split on the question of a non-federal claim properly appended to a federal claim which appears substantial at the time of filing the complaint, but which has been mooted, abandoned, or shown to be insubstantial in the pre-trial proceedings. In *Gibbs*, the Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."[23] This was interpreted by some courts to mean that the power of the court to hear the non-federal claim ended with dismissal of the federal claim.[24] However, the passage quoted appeared in that portion of the *Gibbs* decision which describes conditions under which a state claim might be dismissed as a matter of discretion. Thus, in a compelling case, a court could decide a pendent non-federal claim, even if the federal claim has been dismissed before trial. This view is advocated by Professor Moore,[25] and has prevailed in some courts.[26] The Supreme Court finally resolved the issue in the case of *Rosado v. Wyman*.[27]

In *Rosado* a welfare recipient challenged the New York social services law[28] on the ground that it violated the equal protection clause by providing lesser payments to welfare recipients in Nassau County than it provided to New York City residents. To that constitutional claim was appended a claim that the law was in conflict with the Social Security Act.[29] A three-judge federal panel was convened,[30] but while the panel was deliberating the claim, the New York statute was amended to allow payments to Nassau County residents in amounts equal to those provided to New York City residents. This mooted the equal protection claim. The pendent claim, that the law was in conflict with the Social Security Act, was unaffected by the amendment. The three-judge panel, considering it improper to remain in session to hear the pendent claim, remanded the case to a single federal judge, who decided the pendent claim favorably to the plaintiffs.[31] The Court of Appeals for the Second Circuit split three ways in reversing the judgment of the district court.[32] The opinion of the court held that the federal court lost jurisdiction of the pendent claim when the constitutional issue was mooted. A concurring opinion held that the single

[22] Hall v. E.I. DuPont DeNemours & Co., 312 F. Supp. 358 (E.D.N.Y. 1970); Brody v. McCoy, 259 F. Supp. 940 (S.D.N.Y. 1966).

[23] 383 U.S. 715, 726 (1966).

[24] *See* Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970); Kahan v. Rosentiel, 300 F. Supp. 447 (D. Del. 1969); Erling v. Powell, 298 F. Supp. 1154 (S.D.S.D. 1969); *cf.* United States v. General Ins. Co. of America, 247 F. Supp. 543 (N.D. Cal. 1965).

[25] 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1952 (2d ed. 1969).

[26] Collidotronics, Inc. v. Stuyvesant Ins. Co., 290 F. Supp. 978 (E.D. Pa. 1968); Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968); Sylgab Steel & Wire Corp. v. Strickland Transp. Co., 270 F. Supp. 264 (E.D.N.Y. 1967); Iding v. Anaston, 266 F. Supp. 1015 (N.D. Ill. 1967).

[27] 397 U.S. 397 (1970).

[28] N.Y. Soc. SERVICES LAW § 131-a (McKinney Supp. 1970).

[29] 42 U.S.C. § 602(a)(23) (Supp. V, 1969).

[30] The panel was convened pursuant to 28 U.S.C. § 2281 (1965).

[31] Rosado v. Wyman, 304 F. Supp. 1354 (E.D.N.Y. 1969).

[32] Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969).

judge had the power to hear the pendent claim, but that he should have dismissed it as an exercise of discretion.[33] The dissent argued that not only was there power to hear the pendent claim, but that the district court was correct in exercising that power.[34] In a six-to-two decision, the Supreme Court held that the dismissal of the constitutional claim did not deprive the district court of jurisdiction over the non-federal claim.[35] While indicating that dismissal of the federal claim on the grounds of insubstantiality might require dismissal of the pendent claim, the Court stated: "We are not willing to defeat the common-sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. The Court has shunned this view."[36]

Criticisms of Revised Pendent Jurisdiction. The change in the doctrine of pendent jurisdiction brought about by *Gibbs* has received both acclaim and criticism on the grounds that it is an expansion of pendent jurisdiction.[37] In the view of its critics, pendent jurisdiction should be confined to cases where the decision of the federal claim necessarily decides the issues of the state claim, or where decision of the state claim is necessary to prevent later state court litigation that would undermine the federal decision.[38] Under this view, a party having a federal and a state claim that ordinarily should be tried together and who wishes to avoid a bifurcated lawsuit would usually be forced into the state court. Proponents of this strict view of pendent jurisdiction argue that such a rule would not defeat the desire for judicial economy, because a party who wishes a single lawsuit for his two claims has a forum that allows it—the state court.[39] However, such criticism leans too heavily on the maxim that federal jurisdiction should not be expanded by loose interpretations of the Federal Rules of Civil Procedure or the jurisdictional statutes. It is true that the federal courts are not to use the rules to expand their jurisdiction.[40] Neither are they at war with litigants who prefer the federal forum. If the litigant has the necessary prerequisites to proceed before a federal tribunal in the first instance, he is likely to pursue his case until he gets such a ruling as he can. The federal judge, in deciding whether to hear the state claim, must consider all the relevant facts, including the fact that the litigant is now before him in the federal court ready to proceed to trial of his federal claim. The fact that at some earlier point the litigant could have made a choice that would have allowed him to have a unified lawsuit in another forum must not be substituted for the present reality that the suit will be bifurcated if the federal court refuses to hear the pendent claim.

[33] *Id.* at 180.
[34] *Id.* at 181.
[35] Rosado v. Wyman, 397 U.S. 397 (1970).
[36] *Id.* at 405.
[37] *See* note 4 *supra.*
[38] Shakman, note 4 *supra,* at 285-86.
[39] *Id.*
[40] *See* FED. R. CIV. P. 82; Snyder v. Harris, 394 U.S. 332 (1969).

B. *Joinder of Parties Under a Theory of Pendent Jurisdiction*

Pendent jurisdiction developed as a doctrine of federal question jurisdiction. Properly spoken of, it relates only to joinder of related claims against the same defendants in federal question suits.[41] Joinder of parties is governed by several of the Federal Rules of Civil Procedure[42] and by miscellaneous doctrines of case law.[43]

Rule 20 of the Federal Rules of Civil Procedure reflects the modern view that parties should be allowed to be joined if there is a common question of law or fact in the claims by or against them.[44] But since federal courts are not available to every litigant, it is not enough that the two parties have a common question of law or fact. Each party must be able independently to satisfy jurisdictional requirements.[45] Some recent cases, however, have been making exceptions to this rule, using the *Gibbs* case as authority. Though the difference between joinder of claims, where pendent jurisdiction is applicable, and joinder of parties, where pendent jurisdiction is not applicable, should be clear enough, an examination of the cases will show why the doctrine has begun to appear in joinder-of-party cases.

Joinder of Plaintiffs. In *Borror v. Sharon Steel Co.*[46] the deceased was killed by an explosion at the plant of a Pennsylvania corporation. The plaintiff, Borror, was a citizen of West Virginia and administrator of the estate. Borror brought two actions against the steel company. One was based on the Pennsylvania Survival Act,[47] under which the proceeds of any recovery would be paid into the estate of the deceased, and the other was an action under the Pennsylvania Wrongful Death Act,[48] under which the proceeds would be paid to the parents of the deceased. The steel company conceded that there was diversity for the action under the Survival Act, and did not contest the recovery under that statute. However, it challenged the jurisdiction of the court over the wrongful death

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[41] Tucker v. Shaw, 308 F. Supp. 1 (E.D.N.Y. 1970); Lawes v. Nutter, 292 F. Supp. 890 (S.D. Tex. 1968).

[42] FED. R. CIV. P. 14, 19, 20, 24.

[43] *E.g.*, the requirement of absolute diversity. This familiar doctrine requires that for diversity jurisdiction to exist, all plaintiffs must be diverse to all defendants. *See* Strawbridge v. Curtiss, 1 U.S. (3 Cranch) 575 (1806); Vanderbloom v. Sexton, 294 F. Supp. 1178 (W.D. Ark. 1969); United States v. P.J. Carlin Constr. Co., 254 F. Supp. 1001 (E.D.N.Y. 1965).

[44] All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20.

[45] 3A J. MOORE, FEDERAL PRACTICE ¶ 20.07, at 2821 (2d ed. 1969); *see* Strawbridge v. Curtiss, 1 U.S. (3 Cranch) 575 (1806); Schwab v. Erie L.R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967).

[46] 327 F.2d 165 (3d Cir. 1964).

[47] PA. STAT. ANN. tit. 20, § 320.601 (1950).

[48] *Id.* tit. 12, § 1601 (1953).

action on the ground that the parents, both Pennsylvania citizens, were the real parties in interest, so that the wrongful death action could not be heard in the federal court because there was no diversity. The court held that the two actions could be tried together under a theory of pendent jurisdiction, because the operative facts in each case were identical, as were the plaintiff and defendant, so that to try them together would save the time of witnesses and parties, would protect the tortfeasor from inconsistent judgments, and would make eminent good sense. "[T] he survival action is not federal but is based on diversity and to apply the *Hurn v. Oursler* principle of pendency where diversity of citizenship rather than a federal question is the basis of jurisdiction is an extension, but one which we think is desirable and should be countenanced by law."[49]

Following *Borror*, a father was able to sue the maker of a power mower in a diversity action for negligence which caused injury to his son.[50] The father's claim was for less than the jurisdictional amount and only the claim of the son, which the father was also bringing in capacity of next friend, could have reached the federal court independently. Nevertheless, the court allowed the father's claim to be appended to the son's.

In the above cases, a single plaintiff pursued the claims of two beneficiaries. The courts have also allowed two plaintiffs with claims based on the same injury to join, even though one of the claims may lack the jurisdictional amount.[51] This practice had begun before *Gibbs*, and had been justified on the theory of ancillary, as well as pendent, jurisdiction.[52] Since *Gibbs*, there has been a tendency to refer to this permissive joinder as an exercise of pendent jurisdiction.[53]

This joinder of plaintiffs where one has less than the jurisdictional amount has thus far been confined to fact situations in which more than one member of a family sues for an interest violated because of a wrong to another member of the family. For example, a wife's suit for personal injuries, which claims more than $10,000, may have joined with it a husband's suit for loss of consortium, which claims less.[54] Some courts require the two claims to be interdependent; that is, that there be a law requiring the two to be brought in the same suit.[55] But this is not universally required. In one district court case, a wife sued for personal injuries suffered in childbirth as a result of a negligently performed sterilization operation, and the husband's claim for hospital expenses ($684), even though independent under state law, was joined.[56] Even in the family re-

[49] 327 F.2d at 174.

[50] Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).

[51] Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965).

[52] Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966); Raybould v. Mancini-Fattorre Co., 186 F. Supp. 235 (E.D. Mich. 1960).

[53] Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967).

[54] Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Morris v. Gimbell Bros., 246 F. Supp 984 (E.D. Pa. 1965).

[55] Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968).

[56] Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967).

lationship situation, however, courts will not allow the smaller claim to be appended if there is a substantial divergence in the facts necessary to establish the two claims,[57] and a recent case in the Ninth Circuit questions the propriety of ever extending the doctrine of pendent jurisdiction to any joinder-of-party situation.[58]

Thus, the primary result of the application of the doctrine of pendent jurisdiction to diversity cases has been to allow a claim for less than the jurisdictional amount to ride on the back of a sufficient claim in a case where the facts are similar or identical. Pendent jurisdiction has *not* been used to allow the aggregation of two insufficient claims to meet the jurisdictional amount, and recent developments make it unlikely that this will happen any time soon.[59] Similarly, pendent jurisdiction can not be used to allow a plaintiff who is a citizen of the same state as the defendant to join in a diversity action on the theory that his claim is pendent to that of the diverse plaintiff, although there might be some dispute on this point.

In *Newman v. Freeman*[60] a child, a citizen of Pennsylvania, was injured by a motorist who was also a citizen of Pennsylvania. A guardian from New Jersey was appointed to litigate the suit against the driver in a federal court, thus creating a diversity case. The father then attempted to join, and the defendant objected that the joinder of the father would destroy diversity. The federal district court held that the father could join, analogizing the case to those where an insufficient jurisdictional amount rides on a claim that meets the amount requirement. *Newman v. Freeman* represents the high-water mark of a remarkably permissive attitude by the Third Circuit toward the appointment of out-of-state guardians for the sole purpose of creating diversity. The tolerance of the circuit caused a swarm of such cases to be filed between 1954 and 1968.[61] Two years after *Newman*, however, Pennsylvania district courts began to hold that parents could not be joined in the action pursued by the out-of-state guardian.[62] When a mother, whose joinder was refused by the district court, appealed, the court of appeals did not rule on the question of whether she could be joined, but held that the entire suit could not be maintained because the diversity was manufactured.[63] So, although the Third Circuit has not expressly ruled that a nondiverse party may not be joined with a diverse party in a suit where the facts underlying both claims are identical, it has sorely discredited the one case that has so held.[64]

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[57] Campbell v. City of Atlanta, 277 F. Supp. 395 (N.D. Ga. 1967).

[58] Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969).

[59] *See* note 109 *infra*, and accompanying text.

[60] 262 F. Supp. 106 (E.D. Pa. 1966).

[61] "[T]he rivulet of 'manufactured' diversity cases has swollen to a stream of wide dimensions. . . . We are advised that one out-of-state citizen is the guardian in sixty-one pending diversity cases in the Eastern District of Pennsylvania." McSparran v. Weist, 402 F.2d 867, 871 (3d Cir. 1968).

[62] Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968); Greene v. Pennsylvania R.R., 280 F. Supp. 194 (M.D. Pa. 1968); Meyerhoffer v. E. Hanover Township School Dist., 280 F. Supp. 81 (M.D. Pa. 1968).

[63] McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968).

[64] For a detailed discussion of these cases, see 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 14 n.28 (2d ed. Supp. 1969).

Joinder of Defendants. Three circuits have allowed a defendant who is being sued for less than the jurisdictional amount to be appended in a diversity action if a co-defendant is being sued for more and there is a substantial overlapping of facts.[65] All have agreed that the justification for this joinder is the *Gibbs* case. In *Stone v. Stone*,[66] for example, the grantor of a trust claimed that her beneficiary had diverted approximately $8,000 worth of stock from one trust and aided another beneficiary in wrongfully withholding an additional $5,000. In allowing the second beneficiary to be joined, the court stated:

> [W]e recognize, of course, that the question before us—whether a federal court may exercise jurisdiction in a diversity case over a claim which in itself does not exceed $10,000—is not precisely the same as the question raised under the pendent jurisdiction doctrine—whether a federal court may take jurisdiction in a federal question case over a claim based on state, not federal, law. An apt analogy between the two is, however, at once apparent. . . . [T]he question in both the federal question area and the diversity area is whether a federal court may exercise jurisdiction over a claim which, standing alone, would not meet the jurisdictional test.
>
> We find the force of the analogy most compelling and therefore adopt the approach enunciated by the Supreme Court in *Gibbs*.[67]

Similarly, in *Hatridge v. Aetna Casualty & Surety Co.*[68] the wife of a man injured in a traffic accident, allegedly through the negligence of defendant's insured, brought suit in the state court for loss of consortium. She limited her claim for damages to $9,999.99 in a obvious effort to avoid the federal courts where suits by other parties injured in the same accident were faring poorly. Her action was removed to the federal court where it was consolidated with the insurance company's action for a declaratory judgment absolving it of liability to the husband. The court justified its jurisdiction over the wife's claim on the theory that it was pendent to the insurance company's claim for declaratory relief.

In all of the diversity cases allowing joinder of plaintiffs, and in the above cases allowing joinder of defendants, there has been a requirement that the pendent claim be based on facts nearly identical to or enclosed within the allegations of the claim to which it is appended. It would be a great exaggeration to say that pendent jurisdiction gives the court a general power to allow or to force joinder of parties in all situations where there is merely a common question of law or fact asserted by or against them. The use of pendent jurisdiction to join parties where there is no tie between them, except related claims, has produced differing results. In *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*[69] the Third Circuit considered a federal claim under the antitrust laws with claims against several defendants under state law joined to it. After finding the federal claim not insubstantial, the court continued: "[T]he allegations of Count III were

[65] Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).

[66] 405 F.2d 94 (4th Cir. 1968).

[67] *Id.* at 97.

[68] 415 F.2d 809 (8th Cir. 1969).

[69] 395 F.2d 420 (3d Cir. 1968).

based solely on a state claim asserted against certain non-diversity defendants. We fail to see how this ground is, in and of itself, sufficient to justify a refusal to exercise pendent jurisdiction. The situation mentioned is quite common in pendent jurisdiction and is, indeed, the reason why pendent jurisdiction is invoked."[70]

In *Connecticut General Life Insurance Co. v. Craton*[71] a union sued under section 301 of the Labor Management Relations Act,[72] seeking a declaratory judgment that would require the employer to pay the life insurance benefits the union claimed under the collective bargaining agreement. Alternatively, the union sought enforcement of the employer's commercial contract with a life insurance company which was a surety for the employer. The court assumed pendent jurisdiction over the commercial contract question.[73] In another case with almost identical facts, a district court dismissed that part of the union's suit which sought enforcement of the surety contract between the employer and the insurance company, holding that while the joinder could probably be justified on the strength of *Gibbs*, to do so would not be a wise use of discretion.[74] Other cases hold there is not even power in the federal courts to allow joinder of a nondiverse defendant against whom no federal claim is stated.[75] Thus, the capacity to join nondiverse defendants against whom no federal claim is stated continues to be cloudy. In diversity cases, a defendant cannot be joined unless his joinder would not "destroy diversity." In federal question cases, it is an open and disputed question whether an extra defendant against whom no federal claim is stated can be added. A holding that the defendant against whom no federal claim is stated may not be joined allows a fortuitous strategic advantage to such a defendant, since he can probably intervene as of right if he wishes.[76]

II. Joinder of Parties Needed for Just Adjudication and Intervention as of Right

Joinder of Parties under Rule 19. The 1966 amendments to the Federal Rules of Civil Procedure removed some jurisdictional traps from multiparty suits. The change in the wording of rule 19[77] and the subsequent case

[70] *Id.* at 427.

[71] 405 F.2d 41 (5th Cir. 1968).

[72] 29 U.S.C. § 185 (1964).

[73] *Accord*, Shannon v. United States, 417 F.2d 256 (5th Cir. 1969).

[74] Local 185 v. Copeland Elec. Co., 273 F. Supp. 547 (D. Mont. 1967); *accord*, Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 90 S. Ct. 1125 (1970).

[75] Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969); Bowman v. White, 388 F.2d 756 (4th Cir. 1968); Tucker v. Shaw, 308 F. Supp. 1 (E.D.N.Y. 1970); Ellicott Mach. Corp. v. Wiley Mfg. Co., 297 F. Supp. 1044 (D. Md. 1969).

[76] Smith Pet. Service, Inc. v. Monsanto Chem. Co., 420 F.2d 1103 (5th Cir. 1970); Hardy-Latham v. Wellons, 415 F.2d 674 (4th Cir. 1968).

[77] Rule 19 formerly provided:

> (a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> (b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have

law have changed the rule for joinder of what in the past have been called "indispensable" and "necessary" parties. Two important functions were served by the change. First, it became clear that whether a person is to be joined, if feasible, does not depend on some technical concept, such as whether he has a joint interest in a chose at stake.[78] Second, it is now clearer what the status of the suit is after it has been determined that an absentee who should be joined is unavailable.[79] Some authorities had thought that if an absentee fitted the description "indispensable," then the court's jurisdiction over the suit evaporated if he could not be joined.[80] *In Provident Tradesmens Bank & Trust Co. v. Patterson*[81] the Supreme Court rejected such an approach to the joinder of absentees.

Provident Tradesmens was a personal injury suit where the owner of a car loaned it to two of his friends. While under the control of one of these friends, the car crossed the median strip of a divided highway and collided head-on with a truck. The administrator of the passenger's estate sued the owner's insurer in a diversity action. The owner could not be joined,

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not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) *Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

FED. R. CIV. P. 19.

Rule 19 now provides:

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[78] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 70, at 298-302 (2d ed. 1970).

[79] *See* note 81 *infra*, and accompanying text.

[80] *See* note 82 *infra*, and accompanying text.

[81] 390 U.S. 102 (1968).

because his joinder would have destroyed diversity. The district court heard the case with the owner absent, but the court of appeals ruled that the owner of the car was an "indispensable party," and that the suit could not proceed without him.[82] The Supreme Court reversed.[83] Justice Harlan's majority opinion criticized the approach of the court of appeals, because it did not "follow the provision of rule 19 of the Federal Rules of Civil Procedure that findings of 'indispensability' must be based on stated pragmatic considerations."[84] The Court discussed some of the "pragmatic considerations" which should have been weighed by the court of appeals.

Of these considerations, the availability of an adequate alternate forum is most important.[85] The adequacy of the alternate forum should be evaluated, as should all of the relevant considerations, as of the time of the making of the motion to dismiss.[86] In *Provident Tradesmens* the question of joinder was not raised until the appellate stage. Acknowledging that at the trial level it might have been urged that the plaintiff had an alternate forum in the state court, the Court said: "On appeal, if the plaintiff has won, he has a strong additional interest in preserving his judgment."[87] One court of appeals has gone significantly beyond this in holding that even if the motion is made at trial, a party who properly should have been ruled "indispensable" at trial ceases to be such if the outcome of the trial is one that does not require his presence.[88]

Among the other considerations to be weighed is the prejudice to the movant or the prejudice to the absentee which will result from trial in his absence.[89] It is clear from *Provident Tradesmens* that it will not be enough to show that such prejudice is a mere legal possibility. There, the Court based its decision partially on skepticism that the potential prejudice would ever materialize.[90]

Finally, the court must consider whether it can fashion an adequate remedy in the absence of the party who cannot be joined. It is clear that an 'adequate' remedy is one that will cause those present neither additional liability nor additional litigation.[91] One case illustrates that an "adequate" remedy is not one that will settle the rights of those present and be harm-

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[82] Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 365 F.2d 802 (1968).

[83] Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

[84] *Id.* at 106-07.

[85] Prestenback v. Employers' Ins. Co., 47 F.R.D. 163 (E.D. La. 1969); Levin v. Mississippi River Corp., 289 F. Supp. 353 (S.D.N.Y. 1968).

[86] "Each of these interests must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court." 390 U.S. at 109.

[87] *Id.* at 110.

[88] Miller v. Miller, 406 F.2d 590 (10th Cir. 1969); *accord*, Godine v. Liberty Shoe Co., 396 F.2d 366 (1st Cir. 1968).

[89] *See* note 77 *supra*.

[90] "There remains, however, the practical question whether Dutcher is likely to have any need, and if so will have any opportunity to relitigate . . . . Upon examination, we find this supposed threat neither large nor unavoidable." 390 U.S. at 114-15.

[91] "We read the Rule's . . . criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of relief obtainable against them." 390 U.S. at 111.

less as to those absent, but rather one that will put an end to litigation over the matter.[92]

Intervention as of Right. The 1966 amendments to the Federal Rules of Civil Procedure also clarified the position of one seeking to intervene as of right. Rule 24 now provides: "Upon timely application *anyone* shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . ."[93] Previous to this amendment, a party applying for intervention had to show one of two justifications: that "[t]he representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;"[94] or that he "is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."[95]

The previous rule set up two categories, each of which had a requirement that eliminated many applicants. The first required that the applicant show that he would be "bound" by the judgment of the court. To show that he would be bound, the applicant had to demonstrate that the court's judgment would be res judicata as to him in a subsequent action.[96] Two circuits have recognized that the elimination of the word "bound" eliminated that rule, and have allowed intervention by parties who claimed that a point of law in which they had a substantial interest was being litigated for the first time.[97]

The second category required that the applicant have an interest in "property." The Notes of Advisory Committee on the 1966 Amendment reported that "some decided cases virtually disregarded the language of this provision . . . . This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of."[98] The thrust of the new rule, then, is to allow intervention in situations where before there might have been difficulty.

The Indispensable Absentee and Intervention as of Right. The device of intervention is designed to protect an absentee who might be prejudiced

[92] Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885 (5th Cir. 1968).
[93] FED. R. CIV. P. 24(a) [emphasis added].
[94] *Id.* 24(a)(2).
[95] *Id.* 24(a)(3).
[96] Sam Fox Pub. Co. v. United States, 366 U.S. 683 (1969). *See also* Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960).
[97] Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).
[98] FED. R. CIV. P. 24, Notes of Advisory Committee on Rules, 28 U.S.C. § 2072 (Supp. V., 1969).

by the outcome of the suit. Rule 19(a)(2)(i)[99] also makes an absentee who might be so prejudiced an indispensable party. It seems clear now that any absent party who should be joined for just adjudication under rule 19(a)(2)(i) qualifies as one who may intervene as of right.[100] This can provide a strategic advantage to an absentee if, for example, he cannot be joined because his joinder would destroy diversity[101] or because the venue as to him would be improper. Both these defenses are available to an absentee who is an indispensable party, yet that same person can intervene without destroying diversity[102] and can waive venue objections. However, this tactical advantage of the absentee is not secure. The fact that the absentee has an interest in the outcome may give the court a lever to force his intervention. There are two situations in which the courts may have this leverage.

In one, the absent party is indispensable because he has an interest in the suit which may be jeopardized by the outcome. Ordinarily, the courts are to strive to protect his interests, and if they cannot adequately protect him, they are to dismiss the suit. But when the absent party could intervene and remains absent to impede the suit, the court may be less fastidious in protecting him. In *Smith v. American Federation of Musicians*[103] a district court had to decide whether to proceed in a suit against the international union when the local could not be joined because of improper venue. The court, after noting that the local would surely be prejudiced by a judgment in its absence, elected to proceed with the action, noting pointedly that the local was represented by the same counsel as was representing the national, and was located quite near, though in another jurisdiction, and so could intervene without substantial inconvenience. This discounting of the interests of a party strategically absenting himself will be particularly appropriate for some diversity actions. A party cannot be forcibly joined, no matter how important he is, if his joinder would destroy the absolute diversity required in diversity actions. But that same party can intervene as of right and his intervention does not destroy diversity. Thus, if an absentee has an interest which may be impeded or endangered by the suit, he may be persuaded to abandon his strategic non-participation if he sees that the court is determined to proceed without him.

In the second situation, the strategic absentee is confident that the outcome of the suit will not be detrimental to his interest, but his absence will place one of the parties in peril of inconsistent judgments. Here it may be more difficult to force the absentee to intervene. There is, however, the possibility that a party who has purposely absented himself from a suit in which he might have intervened might be "bound" by the decision even though he is not a party. Thus, in *Provident Tradesmens* the

[99] FED. R. CIV. P. 19.
[100] FED. R. CIV. P. 24, Notes of Advisory Committee on Rules, 28 U.S.C. § 2072 (Supp. V, 1969).
[101] Miller v. Miller, 406 F.2d 590 (10th Cir. 1969).
[102] *Id.*; Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir. 1963).
[103] 47 F.R.D. 152 (S.D.N.Y. 1969).

Court acknowledged that the absent owner was theoretically a peril to the defendant, his insurer, and discussed such a possibility in these words:

> If, as has happened, the three plaintiffs obtain a judgment against the insurance company, . . . Dutcher [the owner] may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision, because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of Dutcher's have been lost by his own inaction.[104]

If the Supreme Court should someday decide that a strategic absentee should lose the right to litigate an issue anew, then there will be few absentees who will remain aloof from a suit. To change intervention as of right to what would be compulsory intervention might be a hard rule for an absentee who brings, for example, valid venue objections to being joined. But there is little reason for allowing the absence of a diversity defendant who, as in *Provident Tradesmens*, has no real reason not to intervene except that it does not suit his purpose. In *Provident Tradesmens* there was little inconvenience to the absentee, since he appeared as a witness and obviously followed the suit closely.[105] A rule of compulsory intervention should distinguish between the strategic absentee and the absentee who has other, valid reasons for remaining absent.

III. A More Rational Approach

As noted earlier,[106] developments in the doctrine of pendent jurisdiction have received much criticism. The contention that federal jurisdiction is being expanded does not identify with sufficient precision the true trend in federal jurisdiction, of which alteration of pendent jurisdiction is only a part. A recent Supreme Court case shows that the antagonism toward expansion of federal jurisdiction still has much validity.

In *Snyder v. Harris*[107] the Supreme Court was faced with a question concerning class actions under the important new rule 23. The plaintiffs in each action had an interest that was far less than the jurisdictional amount, but the interest of the entire class in the action was for far more than the necessary $10,000. Previously, aggregation had been allowed only in what were labeled "true" class actions, where all members of the class had a joint right or interest.[108] The appeals court had reasoned that since the new rule 23 bound all members of the class who did not specifically exclude themselves from the suit, the "matter in controversy" was more than the jurisdictional amount, even though the members of

[104] Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).
[105] *Id.* at 106.
[106] *See* notes 37-39 *supra*, and accompanying text.
[107] 394 U.S. 332 (1969).
[108] "True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted." *Id.* at 335.

the class did not have a "joint" interest in the amount.[109] The Supreme Court reversed, stating that for aggregation to be allowed, it had always been a requirement that the parties seeking to aggregate have a joint interest in the amount in controversy, and that this requirement had not been abolished.[110] Professor Wright[111] sees this decision as a possible unwillingness of the Supreme Court to approve cases such as *Jacobson v. Atlantic City Hospital*,[112] where an action for less than the jurisdictional amount was allowed as a rider in an action for more than the jurisdictional amount and the facts of the two claims were nearly identical. The decision in *Snyder* is not necessarily inconsistent with the jurisdictional rider cases. In fact, the difference between the two may provide a paradigm of the change in federal jurisdiction caused by the desire for "judicial economy." When aggregation is allowed, there are two parties, neither of whom could have gotten into the federal court alone, combining to make a federal suit where none before existed. But in a rider case, the court only adds additional work to a case it must hear in any event. As noted by the Court in *Snyder*, the Rules must not be interpreted in a way that will expand federal jurisdiction. There should not be the same antagonism toward reading the Rules in a way that will allow the court to hear all relevant aspects of a case properly before it.

This ability of a court to hear all relevant aspects of a case before it, and to avoid cases where it cannot hope to settle the dispute once and for all is often described by the phrase "judicial economy." This concept, and the respect it commands today, has re-shaped federal jurisdiction in multiparty and multi-claim cases. The most important facet of this re-shaping is that the question of whether to hear the suit has been removed from the field of jurisdiction. When the Supreme Court in *Provident Tradesmens* emphasized the pragmatic considerations which should be considered in deciding a question of dismissal for non-joinder of an important absentee, it placed this question outside "jurisdictional" lines. Now when a court decides to proceed with such an action, it is not deciding a point of law; it is making a discretionary choice. Its choice is not irrevocable, and there is no need for the court to maintain that its choice would be the same if it were forced to choose at a different point in the litigation. In pendent jurisdiction, both *Gibbs* and *Rosado* mark a similar migration from the zone of jurisdiction to the zone of discretion. The Supreme Court has now ruled that there is power in the federal court to hear a pendent claim if it arises from the same nucleus of operative facts as the federal claim. This test has so expanded the power of the courts to hear pendent claims that relatively few cases have been decided on the issue of power.[113] The courts have made discretionary choices based on a number of factors: Whether it considers the federal claim a sincere one, or just a "gate pass" into the

[109] Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).
[110] 394 U.S. 332, 335 (1968).
[111] Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 197 (1969).
[112] 392 F.2d 149 (3d Cir. 1968).
[113] Weiss v. Sunasco, Inc., 295 F. Supp. 824 (S.D.N.Y. 1969).

federal court in order to litigate the state claim;[114] the amount of time already expended in hearing the non-federal claim;[115] and the crowded conditions of the dockets in an alternate forum.[116] Only rarely have the courts felt it necessary to discuss the threshold question of *power* to hear the non-federal claim.[117]

Jurisdictional traps in multi-party litigation remain. An indispensable party cannot be joined forcibly if his joinder would destroy diversity. A defendant may bring in a third party not diverse to the plaintiff without destroying diversity, but there is authority to the effect that the plaintiff may not state a claim against that third party without destroying diversity.[118] Nevertheless, despite the traps that remain, it is generally true that one who would have the court add another facet to a suit, or one who opposes such a move, must now come before the court not to argue the power of the court to do so, but to show that the move will decrease litigation, make proper use of judicial resources, and settle the dispute as rapidly and as fairly as any other possible suit in any other forum. Broadly viewed, the concept of judicial economy has helped to make multi-party, multi-claim litigation less arcane and more rational.

[114] A.H. Emery Co. v. Marcan Prods., 389 F.2d 11 (2d Cir. 1968); McCall v. Shapiro, 292 F. Supp. 268 (D. Conn. 1968).

[115] A.H. Emery Co. v. Marcan Prods. Corp., 389 F.2d 11 (2d Cir. 1968); Research Frontiers, Inc. v. Marks Polarized Corp., 290 F. Supp. 725 (E.D.N.Y. 1968).

[116] General Foods Corp. v. Struthers Scientific & Int'l Corp., 297 F. Supp. 271 (D. Del. 1969).

[117] Weiss v. Sunasco, Inc., 295 F. Supp. 824 (S.D.N.Y. 1969).

[118] Schwab v. Erie L.R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969).